U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

(202) 565-5330
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NOTICE: This is an electronic bench opinion which has not been verified as official.

Date: 10/29/99
Case No.: 1999 INA 185

In the Matter of:

GEORGE SAVALA, dba EL CONEJO, Employer,

on behalf of

VERONICA SIFUENTES, Alien.

Appearance: Luis Sabroso of Anaheim, California, as agent for Employer and Alien.
Certifying Officer: R. M. Day, Region IX.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of VERONICA SIFUENTES ("Alien") by GEORGE SAVALA, dba EL CONEJO ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the
U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On February 2, 1996, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Mexican Cook" in his Restaurant. AF 24. The position was classified as Cook, Specialty, Foreign Food, under DOT No. 313.361-030.[3] The duties of the Job to be Performed were the following:

> Must use authentic Mexican style recipes, also Mexican apices and dried ingredients. Must prepare and cook Mexican food specialties, such as chili, burritos, carnitas, carne asada, sopes, tortas and tacos. Adds seasonings to food during mixing or cooking, according to personal judgment and experinence. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Prepares meats, soups souces, vegetables and other foods prior to cooking. Seasons and cooks food according to prescribed method. Measures ingredients according to recipe. Must cook eggs any styles, hamburgers, hot dogs and sandwiches. Adjust thermostat controls to regulate temperature of ovens, broilers, grills and roasters.

AF 24, box 13. (Copied verbatim without change or correction.) The Other Special Requirements were,

-2 years minimum experience required
-Must be able to work rotating shifts
-Must have experience using kitchen equipment and utensils.
-Must use authentic Mexican style spices such as dried ingredients.
-Must cook and prepare: adobada, lengua, tripes, carne asada, carnitas, pollo asado, sopes, chilaquiles, pozole, and cabeza

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]313.361-030 **COOK, SPECIALTY, FOREIGN FOOD (hotel & rest.)** Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.). *GOE: 05.10.08 STRENGTH: M GED: R3 M3 L2 SVP: 7 DLU: 77.*

AF 24, box 15. (Copied verbatim without change or correction.) The education and experience that the Employer required consisted of high school graduation plus two years of experience in the Job Offered. The work week consisted of forty hours per week of regular time from 6:00 a.m., to 2:30 p.m., on days that were not specified, plus overtime as needed at time and a half. The salary offered was $240 per week. *Id.*, boxes 10-12, 14-15.[4]

After the job was initially advertised with no responses reported, the state employment security agency ('state agency') advised the Employer that his application indicated that this was not a full service restaurant, that the classification of the position as Cook, Specialty, Foreign Food, under DOT No. 313.361-030, was incorrect, that the more appropriate classification under which to advertise the job would be Cook, Specialty under DOT occupation description No. 313.361-024, that the wage rate offered was materially below the prevailing wage, and that the position should be readvertised under the corrected job description and wage rate.[5] AF 37, 39; also see AF 30. The Employer objected to the reclassification of the position and declined to retest the labor market, denying *inter alia* that the application contained unduly restrictive requirements. AF 32-33, 26-28.

Notice of Findings. On January 19, 1998, the Notice of Findings ("NOF") denied certfication, subject to Employer's rebuttal. AF 20-22. Citing 20 CFR 656.21(b)(2)(i)(A), the NOF said the requirement of two years' experience was unduly restrictive. The NOF affirmed the state agency finding that the correct occupational classification was Cook, Speciality, under DOT No. 313.361-026, which included a Specific Vocational Preparation ("SVP") requirement of six to twelve months. The NOF said

> Job Service notified you September 5 this requirement is excessive for a Specialty Cook. You responded '[i]t is imperative to the success of the business that the employee hired for the position has at least two years experience' without submitting any documentation to support your claim.

AF 21. (Copied verbatim without change or correction.) The Employer was given the options of proving that the unduly restrictive requirement was usual in this occupation, of amending the unduly restrictive requirement, or of justifying this experience requirement with evidence that it

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[4]The Alien was born 1969. She was a national of Mexico, and was living and working in the United States. Instead of describing a visa granting her permission to live and work in the United States, whe simply wrote, "E.W.I." The Alien attended grammar and high school in Mexico for twelve years, graduating in 1986. From 1986 to 1988 she worked as a cook in a restaurant in Mexico. From 1988 to the date of applicaiton she worked for the Employer as a waitress, cashier, and asistant to the cook. AF 69-71.

[5]**313.361-026 COOK, SPECIALTY** (hotel & rest.) Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipe and specific methods applicable to type of cookery. May serve orders to customers at window or counter. May prepare and serve beverages, such as coffee, clam nectar, and fountain drinks May be required to exercise showmanship in preparation of food, such as flipping pancakes in air to turn or tossing pizza dough in air to lighten texture. May designated according to food item prepared as Cook, Fish and Chips (hotel & rest.). *GOE: 05.10.08 STRENGTH: M GED: R3 M2 L2 SVP:5 DLU: 77.*

was based on the Employer's business necessity.[6] *Id*.

Rebuttal. On February 9, 1998, Employer submitted his rebuttal, which included a letter from the immigration agent which Employer had countersigned, advertisements from the Los Angeles Times for cooks requiring a minimum of two years of experience, description of specialty Mexican style dishes offered in the Employer's restaurant, a copy of the restaurant's current menu, documents relating to another alien, and a letter recommending the Alien and describing her work experience. AF 06-19.

Final Determination. On July 27, 1998, the CO issued a Final Determination, in which certification was denied. The CO found that Employer failed to establish a business necessity for the two-year experience requirement, explaining,

> NOF questioned the necessity of your two-years experience requirement since the nature of the job and your business establishment appear consistent with a lesser-skilled Specialty Cook. You rebut with several newspaper ads of Cooks requiring two years experience and some recipes. You have not documented the business necessity of two years experience. The evidence you submit shows your business to be less than the full-service restaurant described in the DOT under Cook, Foreign Specialty.

AF 05. As the rebuttal documentation failed to sustain Employer's burden of proof, the CO denied labor certification. AF 03-04.

Appeal. In his appeal dated August 27, 1998, the Employer argued that he had always required two years experience of all his employees. The Employer further contended that the DOT description of a Cook, Foreign Speciality, did not include any reference to a full-service restaurant. The Employer argued that his job description matched that of a Cook, Foreign Speciality and he noted that all food served in his restaurant was prepared from fresh ingredients and was not merely purchased in ready to cook form. AF 02.

DISCUSSION

Issue. Because the CO rejected the Employer's requirement of two years of experience in the Job offered, the SVP applicable to the facts of this case is the ultimate issue. The issue disputed the classification of the Job Offered as a "Cook, Speciality" under DOT occupation description No. 313.361-026, which required the CO to reject the Employer's identification of the position as "Cook, Specialty, Foreign Food" under DOT occupation description No. 313.361-030. The arguments concerning the disputed classification arose from the length of the SVP for

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[6]In proving business necessity, the NOF cautioned the Employer that such requirements cannot be merely for the Employer's convenience and personal preference, and that he must document that the job requirements bear a reasonable relationship to the occupation in the context of the business and were essentilal to perform the job duties in a reasonable manner. AF 21-22.

the respective occupations, as the SVP for a Cook, Speciality is 5, while the SVP for a Cook, Specialty, Foreign Food is 7. See discussion *supra* under Notice of Finding.[7]

Burden of proof. The factual findings of the CO will be affirmed, if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. **Haddad**, 96 INA 001 (Sep. 18, 1997). Moreover, in all proceedings under the Act and implementing regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification.

Because certification of alien workers is an exception to the general exclusion of immigrants, the Panel is required to construe its provisions strictly, and it must resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen,** 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). Congress enacted § 212(A)(14) of the Immigration and Nationality Act of 1952 (as amended by § 212(a)(5)(a) of the Immigration Act of 1990 and recodified at 8 U.S. C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." **Cheung v. District Director, INS**, 641 F2d 666, 669 (9th Cir., 1981); **Wang v. INS**, 602 F2d 211, 213 (9th Cir., 1979).[8] To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Pursuant to the favored treatment Congress legislated for the limited class of alien workers whose skills were needed in the U. S. labor market, 20 CFR § 656.2(b) assigned the burden of proof in an application for alien labor certification under this exception to the general exclusion of aliens

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[7] In Appendix C the DOT defined the Specific Vocational Preparation as the amount of elapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. "This training," Appendix C continued, "may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs." The following are the various levels of specific vocational preparation that the DOT fixed at Appendix C: **Level Preparation**

1	Short demonstration only.
2	Anything beyond short demonstration up to an including 1 month.
3	Over 1 month up to and including 3 months.
4	Over 3 months up to and including 6 months.
5	Over 6 months up to and including 1 year.
6	Over 1 year up to and including 2 years.
7	Over 2 years up to and including 4 years.
8	Over 4 years up to and including 10 years.
9	Over 10 years.

[8]The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

under the Act. This regulation quoted and relied on § 291 of the Act (8 U.S.C. § 1361), which provided:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... .

Employer's evidence. The state agency's remand and the NOF agreed that the dispute turned on a choice between the length of work experience Employer required for the position, two years, and the SPV the CO determined was more appropriate for the work actually performed, between six months and one year. By filing a copy of its menu in the rebuttal the Employer established that the dishes it usually served consisted of burritos, tacos, tostadas, and fajitas in dinners and combination dinners, and that it also served Mexican style egg dishes as "Breakfast Specials." AF 10. The level of complexity of the sample dishes that the Employer's rebuttal described reflected the extent of training a worker would rquire to cook for the Employer. As these descriptions and recipes for beef enchilada and chili con carne with beans did not appear to demand skills that would require more than a year's work experience in a Mexican kitchen, their appearance in the record without further explanation was not persuasive that an SVP that exceeded 5 would be necessary to train a worker as a cook in its kitchen. While the Employer relied on the use of authentic Mexican spices as a reason to claim a higher level of expertise, this was not persuasive, either, since the recipes to be followed would identify the spices he required and there was no evidence that a worker would require more than a year to learn how to add the spices in accordance with the recipe's directions.

Analysis and conclusion. Because this issue turns on the SVP 7 required of a Cook, Specialty, Foreign Food in DOT No. 313.361-030, it is appropriate to compare the skills of this occupation with expertise levels demanded of two similar occupations that also require an SVP 7, a Cook in DOT No. 313.361-014, and a Chef in DOT No. 313.131-014. There was no evidence supporting his contention that a worker would require at least two years to learn how to season and cook food according to prescribed methods; how to measure the ingredients according to recipe; how to adjust thermostat controls to regulate temperature of ovens, broilers, grills and roasters; how to observe and test food being cooked by tasting, smelling, and piercing with fork to determine that it is cooked; how to prepare meats, soups sauces, vegetables and other foods prior to cooking; and how to cook eggs any style; and how to cook hamburgers and hot dogs and make sandwiches. Even though Employer's description of the job duties in AF 24, box 13, included some of the skills of the Cook in DOT No. 313.361-014, he did not provide evidence connecting these exhibits with the job skills and the time required to learn them. Consequently, the menu and sample dishes Employer placed in evidence did not establish that the skills he described in the job duties would require more than twelve months to learn.

The CO suggested that the experience required for this position may be better compared

with the SVP requirements for a Cook, Fast Food, in DOT No. 313.374-010, and a Cook, Specialty, in DOT No. 313.361-026, both of which have an SVP of 5. The CO said the DOT job description of the "Cook, Speciality" indicates that it is a position that would be more likely to be found in less formal or "fast food" restaurants, while a "Cook, Speciality, Foreign Food" would more commonly be hired in a more formal restaurant setting. Noting the Employer's argument that the DOT entry for the "Cook, Specialty, Foreign Food" does not include any description of a full-service restaurant, we observe that the language used did indicate that the work outlined requires more sophisticated cooking methods in a restraurant business that requires the cook to prepare and serve food to the waiters on specific orders, even though this characteristic alone does not compel the distinction. The DOT divided the different types of Cook position descriptions into categories that vary according to the level of sophistication of the tasks involved, however. For example, a more general position as Cook under DOT No 313.361-014 includes both supervisory duties and menu planning, and job description provides for a two to four year experience level under SVP 7, which also is found in the description of the Cook, Speciality, Foreign Food in DOT No. 313.361-030. As both of these cooking job descriptions clearly contemplate the more complex work that is commonly is required by more sophisticated eating establishments, such a comparison would be persuasive. By contrast, the Cook, Speciality, description indicates a lower requirement of work experience that more closely matches the Job Offered in this Application, which also includes routine preparation of ethnic speciality items on a standard menu and does not also require the planning or supervisory duties of the higher level job descriptions.

For these reasons, the type of food to be prepared is less persuasive that the level and scope of the cooking duties performed, as well as the additional responsibilities that may or may not be included in the job. The standard menu Employer submitted on rebuttal supports the CO's finding that the speciality cook description was more appropriate since it indicated that the cook in Employer's resturant did not respond to individual orders to prepare dishes, but simply prepared specialty food items according to the recipes and specific methods applicable to this type of cookery. Consequently, the Employer failed to document that in his establishment the Cook must perform the higher level of sophisticated cooking for individual orders nor does the Cook in this restaurant do the planning or supervising of other cooks that were required by the occupation descriptions which included an SVP of 7. Since Employer did not submit sufficient evidence to support his claim that the DOT description of a Cook, Specialty, was inappropriate for this job opportunity, his two year experience requirement remains unduly restrictive. Moreover, as the Employer failed to establish the business necessity of the two year experience requirement in SVP 5, the denial of certification by the CO should be affirmed and the following order will enter.[9]

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[9]The Board definitively explained how an employer can prove "business necessity" in **Information Industries, Inc.**, 88 INA 082 (Feb. 9, 1989). The holding in **Information Industries** required an employer to show (1) that the foreign language requirement bears a reasonable relationship to the occupation in the context of the employer's business, and (2) that the foreign language requirement was essential to performing, in a reasonable manner, the job duties as described by the employer's application.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: 1999 INA 185
GEORGE SAVALA, dba EL CONEJO, Employer,
VERONICA SIFUENTES, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis	10/5/99		
Huddleston	8/3/99		

Thank you,

Judge Neusner

Date: July 14, 1999